

United States District Court

Eastern District of California

Patrick Ronald Holley,

Plaintiff, No. Civ. S 04-1425 GEB PAN P

vs. Order

California Department of
Corrections, et al.,

Defendants.

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Plaintiff is a state prisoner without counsel prosecuting a civil rights action.

July 25, 2005, the court dismissed all of plaintiff claims except his claim that defendant Herrera retaliated against plaintiff. The court found the pleading stated a claim that the other seven defendants ratified Herrera's misconduct and showed a callous indifference to constitutional rights. See Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991). However, they

1 were unexhausted.

2 June 9 and July 18, 2005, plaintiff requested leave to
3 supplement his pleading. August 4, 2005, plaintiff filed an
4 amended complaint as of right. See Fed. R. Civ. P. 15 (plaintiff
5 may amend once as of right before any responsive pleading is
6 served). He moved October 21, 2005, to "strike" prior requests
7 re supplemental pleading.

8 October 24, 2005, plaintiff moved to file a second-amended
9 complaint, naming as defendants those previously dismissed for
10 failure to exhaust administrative remedies. Plaintiff explains
11 exhaustion is now complete, and he also seeks to add Warden
12 Schwartz as a defendant under a ratification theory. Defendant
13 Herrera opposed November 7, 2005, contending McKinney v. Carey,
14 311 F.3d 1198 (9th Cir. 2002), precludes amendment. Herrera
15 further argues the claim against Schwartz alleges supervisory
16 McKinney does not bar amendment to plead newly-exhausted
17 claims. As for defendant Schwartz, plaintiff's pleading is
18 sufficient for reasons explained as to other supervisory
19 defendants in my June 21, 2005, finding and recommendation.

20 Plaintiff moved March 30, 2005, to compel discovery.
21 Herrera opposed and moved for a protective order, arguing that
22 discovery propounded on defendants subsequently dismissed
23 required no answer. November 14, 2005, plaintiff again moved to
24 compel, and Herrera again opposed for the same reasons.

25 I have not set a discovery deadline.

26 Good cause appearing:

1. Plaintiff's October 24, 2005, motion for leave to file a second-amended complaint is granted under the liberal amendment principles set forth in Fed. R. Civ. P. 15. Defendants shall answer within 20 days.

2. Plaintiff's October 21, 2005, motion to strike is granted and his June 9 and July 18, 2005, motions to supplement the pleading are deemed withdrawn.

3. Plaintiff's March 30, 2005, motion to compel, defendant's July 29, 2005, motion for a protective order and plaintiff's November 14, 2005, motion to compel are denied without prejudice to new motions made in light of plaintiff's amended pleading.

So ordered.

Dated: January 19, 2006.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge